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Ruiz v. Robinson: Stemming the U.S. Citizen Casualties in the War of Attrition Against Undocumented Immigrants¹

Andrew R. Verblow, Esq.²

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I. INTRODUCTION

Because Congress possesses plenary³ and nearly unbounded⁴ power to regulate matters of immigration policy, immigration law has traditionally been an exclusively federal consideration.⁵ In the 1990s, federal immigration laws were revised with the goal of discouraging undocumented immigrants from remaining in the United States by restricting their access to public benefits.⁶ Over the past several years, state legislators have become frustrated with what they perceive to be inadequate federal efforts to address the problems created by the large number of undocumented immi-

1. The term “undocumented immigrant” will be used throughout this article as the term “illegal immigrant” is generally considered pejorative. See Susan E. Babb, *Analysis of An Analogy: Undocumented Children and Illegitimate Children*, 1983 U. ILL. L. REV. 697, n.1 (1983).

2. J.D., *magna cum laude*, University of Miami School of Law, May 2013. I am indebted to the talented editorial staff of this journal. Grateful acknowledgments are due to Eric S. Boos and Jamie Lynn Vanaria. I would like to take this opportunity to show my appreciation to Prof. Sergio J. Campos and Prof. Ricardo J. Bascuas. Their contributions to my legal education gave me the skills to draft this note. Finally, I must thank my family and Ashley Danielle Knarr. Their support of my efforts enabled this achievement.

3. U.S. CONST. art. I, § 8, cl. 4; *Toll v. Moreno*, 458 U. S. 1, 10 (1979).

4. *Rodriguez v. I.N.S.*, 9 F.3d 408, 413 (5th Cir. 1993).

5. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889).

6. See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. § 1621 (2010) (placing federal constraints on a state’s ability to offer public benefits to undocumented immigrants); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1623 (limiting the ability of undocumented immigrants to qualify for higher education tuition benefits).

grants living in the U.S.⁷ This frustration has resulted in an explosion of immigration-related legislation at the state level.⁸ The number of state bills relating to immigration matters has increased five-fold between 2005 and 2011.⁹ State immigration laws have built on the existing federal goals of removing the incentives for undocumented immigrants to remain within their borders and have sought to enhance the ability of state law enforcement agencies to administer federal immigration laws.¹⁰ Notably, the controversial 2010 Arizona law, Support Our Law Enforcement and Safe Neighborhoods Act, specifically established a state policy of “attrition through enforcement.”¹¹ Though challenged by the federal government as an intrusion into an area of exclusive federal authority, the U.S. Supreme Court substantially upheld the Arizona law in 2012.¹²

A major front in this “war of attrition” is the battle over how much access undocumented immigrants should have to public education benefits. In *Plyler v. Doe*, the Supreme Court explicitly prohibited states from denying access to free public elementary and secondary educations to undocumented immigrants.¹³ However, the law remains murky when it comes to post-secondary education tuition benefits. Within the statutory framework of overlapping state and federal immigration policy, undocumented immigrants are generally ineligible for residency-based tuition benefits at public post-secondary educational institutions.¹⁴ Residency based tuition benefits—‘in-state tuition’—refer to the

7. See Dina Francesca Haynes, Symposium Forward, *Crossing the Border: The Future of Immigration Law and its Impact on Lawyers*, 45 NEW ENG. L. REV. 301, 303 (2011) (“it comes as little surprise that states have begun to press the federal government with the implicit threat: if you do not assist us in providing services to the noncitizens within our state, we will pass our own laws and take matters into our own hands.”)

8. *Immigration-Related Laws and Resolutions in States* (Jan. 1–Dec. 31, 2012), NAT’L CONF. STATE LEG., <http://www.ncsl.org/research/immigration/2012-immigration-related-laws-jan-december-2012.aspx> (last visited Nov. 20, 2013).

9. *Id.*

10. See, e.g., S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (requiring, *inter alia*, officers conducting a stop, detention or arrest to verify the person’s federal immigration status and giving state and local law enforcement officers specific investigative duties and arrest authority over certain classes of undocumented immigrants).

11. *Id.*

12. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

13. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

14. 8 U.S.C. § 1623(a) (prohibiting states from offering these benefits to undocumented immigrants unless the state is willing to offer the benefit to all U.S. citizens regardless of their residency within the state).

reduced tuition rate offered to state residents who attend a public post-secondary educational institution within the state.¹⁵ In order to establish state residency for purposes of in-state tuition benefits, many states look to the residency of a student's parents if the parents claim the student as a dependent for tax purposes.¹⁶ Since undocumented immigrants cannot establish legal residency within a state, the eligibility of their U.S. citizen children for in-state tuition benefits is a complex legal question. Michelle J. Seo addresses this issue in her article "*Uncertainty of Access: U.S. Citizen Children of Undocumented Immigrant Parents and In-State Tuition for Higher Education*."¹⁷ Seo worries that "citizen children are in danger of becoming the unsuspecting victims of state and federal policies aimed at addressing illegal immigration."¹⁸

If the U.S. citizen children of undocumented immigrants are in danger of becoming casualties in the war of attrition against undocumented immigrants, the Southern Poverty Law Center's (SPLC) recent victory in *Ruiz v. Robinson*¹⁹ may stem the onslaught. In *Ruiz*, the SPLC challenged Florida's system of administering in-state tuition benefits because Florida classified dependent U.S. citizen students who reside in Florida as non-residents based on their parents' federal immigration status. The SPLC prevailed on its motion for summary judgment and Judge K. Michael Moore issued a final order which declared Sections 6A-10.044(4)(a) and 72-1.001(5)(a)(3) of the Florida Administrative Code to be in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.²⁰ The court's ruling rests in part on its finding that tuition benefits should properly been seen as flowing to the student, and not to the household, in cases where the citizen student is a dependent child. However, the opinion did not consider how Florida's policy of classifying students as either dependent or independent can continue if tuition is not a household benefit. As a result, the decision may

15. See *infra* Part II and accompanying notes for a discussion of how in-state tuition benefits operate.

16. *Id.*

17. Michelle J. Seo, *Uncertainty of Access: U.S. Citizen Children of Undocumented Immigrant Parents and In-State Tuition for Higher Education*, 44 COLUM. J.L. & SOC. PROBS. 311, 312 (2011).

18. *Id.* at 312 (citing Bill Piatt, *Born As Second Class Citizens In The U.S.A.: Children Of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 54, n.2 (1988)).

19. *Ruiz v. Robinson*, 892 F.Supp.2d 1321, 1321 (S.D. Fla. 2012).

20. Final Judgment at 2, *Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF. No. 109).

result in ambiguity as to how Florida can award in-state tuition benefits without running afoul of federal law.

This note will analyze the decision in *Ruiz v. Robinson* and suggest that it is a symptom of the burgeoning tension between the state and federal government on immigration matters. Part II will outline how in-state tuition benefits are awarded in general, and explain why Florida's system was ripe for the SPLC's challenge. Part III will explain the proceedings in *Ruiz* and highlight why Judge Moore's decision could lead to tension within the existing framework of post-secondary education benefits. Part IV will conclude by suggesting that the problems created by *Ruiz* cannot be resolved by the courts, or by the state legislatures, but must be resolved by Congress.

II. THE TWO-TIERED STRUCTURE OF IN-STATE TUITION BENEFITS FOR U.S. CITIZEN CHILDREN OF UNDOCUMENTED IMMIGRANTS²¹

Although the award public benefits at the state level—including tuition benefits for post-secondary educational institutions—is ordinarily a matter of state law,²² federal law restricts the ability of states to confer benefits on undocumented immigrants.²³ As federal immigration policy is aimed at deterring undocumented immigrants from remaining in the U.S., there are two federal laws that directly address the ability of states to confer in-state tuition benefits on undocumented immigrants. These two statutes are the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)²⁴ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).²⁵ The PRWORA was a general entitlement reform act intended to reduce dependency on government aid, and the IIRIRA was similarly intended to encourage personal responsibility among immigrants and reduce the ability of undocumented immigrants to rely on government aid.²⁶ The

21. This section builds on the analysis done by Seo, *supra* note 17 at 323-25.

22. The conferral of public benefits by states remain subject to the obvious limitations on state power that exist in all contexts. For example, states cannot confer benefits in discriminatory ways that violate the U.S. Constitution.

23. 8 U.S.C. § 1621.

24. Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Act) of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, & 42 U.S.C.).

25. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 & 18 U.S.C.).

26. See 8 U.S.C. § 1601 ("Self-sufficiency has been a basic principle of United

PRWORA excluded undocumented aliens from the class of aliens eligible to receive public benefits, which include tuition benefits for post-secondary education.²⁷ The IIRIRA addresses post-secondary education benefits directly and attaches a serious condition to a state's ability to offer tuition benefits to undocumented immigrants.²⁸ The IIRIRA does not prohibit states from offering in-state tuition benefits to undocumented immigrants but requires as follows:

[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.²⁹

This condition affectively prohibits states from offering in-state tuition benefits to undocumented immigrants because extending in-state tuition benefits to all U.S. citizens would be a significant blow to a state's revenue.³⁰ For convenience, the relevant portions of PRWORA and IIRIRA will be referred to as Section 1623, as this is where they are currently codified in the United States Code.

Due to the financial impracticability of extending in-state tuition benefits to all U.S. citizens, no state in the country formally extends such benefits to undocumented immigrants on the basis of their residence within the state. Nonetheless, ten states have capitalized on a loophole in IIRIRA and confer in-state tuition bene-

States immigration law since this country's earliest immigration statutes. It continues to be the immigration policy of the United States that aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and the availability of public benefits not constitute an incentive for immigration to the United States.") (internal paragraph indicators omitted).

27. 8 U.S.C. § 1623.

28. 8 U.S.C. § 1623(a).

29. *Id.*

30. *E.g.*, *Ruiz v. Robinson*, 892 F.Supp.2d 1321, 1331 (S.D. Fla. 2012) ("extending the benefit of in-state tuition rates to all nonresident U.S. citizens currently enrolled in Florida's public universities and colleges would result in a loss of \$200,000,000 in tuition revenue per year, a significant negative impact on Florida's public universities and colleges, which depend on being able to charge full tuition rates to admitted applicants who do not qualify for in-state tuition rates.") (quoting Defendant's Motion for Summary Judgment).

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fits on a basis other than residency within the state.³¹ These ten states are as follows: California,³² Illinois,³³ Kansas,³⁴ Nebraska,³⁵ New Mexico,³⁶ New York,³⁷ Texas,³⁸ Utah,³⁹ Washington,⁴⁰ and Wisconsin.⁴¹ In 2003, Oklahoma also extended in-state tuition benefits to undocumented immigrants, but the statute was repealed in 2007.⁴² The ten states that currently grant in-state tuition benefits to undocumented immigrants condition the receipt of the benefits on whether the undocumented immigrant attended secondary school within the state. By doing so, they condition the receipt of in-state tuition benefits on something other than residency within the state and hence, manage to skirt the requirements of IIRIRA.⁴³

This loophole has not been extensively challenged and it is difficult to predict whether it would be upheld in a federal court. Only the Supreme Court of California has specifically examined the question and upheld a statutory scheme that grants in-state tuition benefits to undocumented immigrants who graduate from high school within a state, while denying in-state tuition benefits to U.S. citizens who reside outside the state.⁴⁴ One reason for the lack of litigation on the issue may be because of the difficulty a challenger faces in establishing standing. At least one potential challenge has been thwarted on this basis. In 2005, a group of students who were paying non-resident tuition in Kansas regents schools brought suit in the U.S. District Court for the District of Kansas, alleging that the Kansas statutory scheme deprived them of a federally guaranteed right to pay in-state tuition.⁴⁵ The plaintiffs' claims were dismissed for lack of standing because the plain-

31. Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1765 (2009).

32. CAL. EDUC. CODE §68130.5 (West 2002).

33. 110 ILL. COMP. STAT. ANN. 305 / 7e-5 (2013).

34. K.S.A. §76-731a (2012).

35. NEB. REV. STAT. ANN. § 85-502 (2012).

36. N.M. STAT. ANN. §21-1-1.2 (2010).

37. N.Y. EDUC. LAW §355(2)(h)(8) (2013).

38. TEX. EDUC. CODE ANN. § 54.052 (2005).

39. UTAH CODE ANN. § 53B-8-106 (2002).

40. WASH. REV. CODE ANN. § 28B. 15.012 (2012).

41. WIS. STAT. § 36.27 (2011).

42. OKLA. STAT. ANN. TIT. 70, § 3242, *repealed by* Oklahoma Taxpayer and Citizen Protection Act of 2007 (H.B. 1804)].

43. *See, e.g.,* Martinez v. The Regents of the Univ. of Cal., 241 P.3d 855, 859-60 (Cal. 2010).

44. *Id.*

45. Day v. Sebelius, 376 F. Supp. 2d 1022, 1025 (D. Kan. 2005).

tiffs were not subject to the provisions of the statute they challenged and, therefore, could not establish injury-in-fact.⁴⁶

A survey of the in-state eligibility and residency requirements of all fifty states leaves it unclear how these states would classify the U.S. citizen children of undocumented immigrants.⁴⁷ This is because in most states dependent students are classified as residents of a state only if his or her parents can establish residency within the state.⁴⁸ If the student receives the benefit because his or her parent has been classified as a resident, it is extremely unclear whether federal law would require states to extend in-state tuition to all U.S. citizens. If the state considers the residency of the students' parents in order to extend the benefit, that benefit might be seen as flowing to the parent and not the child, triggering Section 1623.

Three states have explicitly explained how their states would classify U.S. citizen children of undocumented immigrants for purposes of establishing their eligibility for in-state tuition.⁴⁹ These states are Virginia,⁵⁰ Colorado,⁵¹ and Florida.⁵² Significantly, none of these states answered the question through statute. In all three cases, the issue was addressed through the state's executive branch. In Colorado⁵³ and Virginia,⁵⁴ residency statutes were interpreted in memos released by each state's respective

46. *Id.* at 1033.

47. Seo, *supra* note 17, at 325.

48. *Id.*

49. That is not to say that other states don't have comparable policies of denying tuition benefits to the U.S. Citizen children of undocumented immigrants by conditioning receipt of the benefits on the legal residency of the parent. For example, New Jersey had an administrative regulation almost identical to the Florida regulation at issue in *Ruiz*. N.J.A.C. 9A:9-2.2. This administrative regulation was struck down by the Superior Court of New Jersey Appellate Division on reasoning similar to the reasoning of *Ruiz*. *A.Z. v. Higher Education Student Assistance Authority*, 48 A.3d 1151 (N.J. Super. Ct. App. Div. 2012). However, it appears that only Virginia, Colorado, and Florida have explicitly addressed in-state tuition benefits. The policies of other states address state scholarships or benefits distinct from in-state tuition.

50. VA. CODE ANN. § 23-7.4(C) (2010).

51. COLO. REV. STAT. § 23-7-110 (2010).

52. FLA. STAT. §1009.21 (2011).

53. Colo. Att'y Gen. Op. No. 07-03/HE AGBCF (2007), *available at* http://www.coloradoattorneygeneral.gov/ag_opinions/2007/no_07_03_ag_alpha_no_he_agbcf_august_14_2007 (last visited Oct. 31, 2013) [hereinafter Colorado Memorandum].

54. Ronald C. Forehand, Memorandum from Ronald C. Forehand, Senior Assistant Attorney General, Commonwealth of VA, to Lee Andes, State Council of Higher Educ. for VA (2008), *available at* <http://acluva.org/wp-content/uploads/2009/12/20080306AGmemoInStateTuition.pdf> (last visited Oct. 31, 2013) [hereinafter Virginia Memorandum].

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attorney general. In Florida, administrative regulations were promulgated, which explained how state universities were to administer the state's residency statutes.⁵⁵

Ultimately, Colorado and Virginia adopted opposite conclusions. The attorney general of Colorado concluded that the citizenship status of a parent could not be a basis for denying in-state tuition benefits to resident U.S. citizens.⁵⁶ The attorney general of Virginia stated that Virginia's statute precluded undocumented immigrants from establishing residency on behalf of their citizen children.⁵⁷ The Virginia Memorandum broke the issue down into two questions: first, could an undocumented immigrant be considered a legal resident of Virginia; second, could the citizen child of such a parent be eligible for in-state tuition benefits.⁵⁸ The first part was dispensed with by the following conclusory determination: "it is clear that a person who is not lawfully present in the United States—the parents, in this case—may not be domiciled in Virginia. We need not go into further analysis of this point."⁵⁹ As to the student's eligibility, the attorney general stated that dependent students "'stand in the shoes of their parents' with respect to domicile."⁶⁰ The attorney general supported his determination with reference to the Virginia Code and the State Council of Higher Education for Virginia Domicile Guidelines.⁶¹ However, the memorandum does allow for U.S. citizen children of undocumented immigrants to challenge their presumption of ineligibility by presenting evidence of residency in Virginia on a case-by-case basis.⁶²

Although the attorney general of Colorado reached the opposite conclusion, he also divided his analysis into two parts.⁶³ First, the attorney general had to determine whether citizen children of undocumented immigrant parents are eligible for in-state tuition as a matter of federal law.⁶⁴ Second, the attorney general had to determine what it meant to be domiciled in Colorado under Colorado law.⁶⁵ The memorandum concluded that, as a matter of fed-

55. FLA. ADMIN. CODE r. 6A-10.044 (adopted 1992); *id.* at 72-1.001 (2011).

56. Colorado Memorandum, *supra* note 53.

57. Virginia Memorandum, *supra* note 54.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* (citing VA. CODE ANN. § 23-.7.4(C) (2010)).

62. Virginia Memorandum, *supra* note 54.

63. Colorado Memorandum, *supra* note 53.

64. *Id.*

65. *Id.*

eral law, U.S. citizen children were necessarily eligible for in-state tuition benefits because they are U.S. citizens.⁶⁶ In reaching this conclusion, the attorney general essentially found that tuition benefits flow to the student and not to the student's parents or to the student's household.⁶⁷ Again, the significance of this conclusion cannot be overstated; the question of whether the benefit goes to the citizen or to the household is a fundamental tension between state and federal statutes governing the eligibility of U.S. citizen children of undocumented immigrants to receive public benefits. The Colorado Memorandum does not go into length on this point, but it focuses on the fact that ultimately students—and not their parents—are responsible for paying tuition.⁶⁸ Seo observes⁶⁹ that this reasoning echoes the reasoning of the U.S. Court of Appeals for the Seventh Circuit in *Doe v. Reivitz*.⁷⁰ *Reivitz* dealt with the ability of undocumented immigrants to receive public benefits under a program that provided assistance to unemployed parents (Aid to Families with Dependent Children AFDC-UP).⁷¹ The court ultimately concluded that undocumented immigrant parents of citizen children were necessarily eligible for AFDC-UP because the public benefit sought was to flow to the U.S. citizen child, and a public benefit could not be withheld from a U.S. citizen based on the alienage of the parent.⁷²

The attorney general also concluded that Colorado law allowed the U.S. citizen children to qualify as residents as long as their parents could establish that Colorado was their domicile under Colorado law.⁷³ Significantly, for purposes of establishing residency for tuition benefits, Colorado law defines domicile as a “person’s true, fixed, and permanent home and a place of habitation. It is the place where he intends to remain and to which he expects to return when he leaves without intending to establish a new domicile elsewhere.”⁷⁴ This conception of how one establishes residency for purposes of qualifying for in-state tuition benefits differs significantly from the comparable Florida statute. Section 1009.21(2)(A) states:

66. *Id.*

67. *Id.*

68. *Id.*

69. Seo, *supra* note 17, at 347.

70. 830 F.2d 1441 (7th Cir. 1987), *amended by* 842 F.2d 194 (7th Cir.1988).

71. *Id.* at 1442-45.

72. *Id.* at 1451.

73. Colorado Memorandum, *supra* note 53.

74. COLO. REV. STAT. § 23-7-102(2) (West 2013).

To qualify as a resident for tuition purposes:

1. A person or, if that person is a dependent child, his or her parent or parents must have established **legal residence** in this state and must have maintained legal residence in this state for at least 12 consecutive months immediately prior to his or her initial enrollment in an institution of higher education (emphasis added).

“Legal residency” is a much higher burden than “domiciled within the state.” In fact, there is case law that suggests an undocumented immigrant can never be considered a legal resident of a state. In *Melian v. INS*,⁷⁵ the U.S. Court of Appeals for the Eleventh Circuit was required to determine what Congress meant when it used the phrase “lawful domicile” in a section of the Immigration and Nationality Act.⁷⁶ The court held that “lawful domicile” means “at least the simultaneous existence of lawful physical presence in the United States and lawful intent to remain in the United States indefinitely.”⁷⁷

Notwithstanding how a court may have interpreted Section 1009.21(2)(A), the definitive interpretation of “legal residence” can be found in two identical provisions of Florida’s Administrative Code. Sections 6A-10.044(4)(a) and 72-1.001(5)(a)(3) of the Florida Administrative Code establish the requirements for receiving in-state tuition benefits. The code states:

5) A non-United States citizen may be eligible to establish residency for tuition purposes if evidence is presented verifying that he or she is legally present in the United States, has met the residency requirements of Section 1009.21, F.S., and the person is one of the following:

(a) A foreign national in a nonimmigrant visa classification that grants the person the legal ability to establish and maintain a bona fide domicile in the United States according to the United States Citizenship and Immigration Services (USCIS).

1. The following visa categories grant the person the legal ability to establish and maintain a bona fide domicile in the United States according to USCIS: A, E, G, H-1B, H-1C (classification expires 12-20-2011), I, K, L, N, NATO 1-7, O-1, R, S, T, U, and V.

2. The following visa categories do not grant the person the

75. *Melian v. INS*, 987 F.2d 1521, 1523 (11th Cir. 1993).

76. *Id.* at 1524.

77. *Id.*

legal ability to establish and maintain a bona fide domicile in the United States according to USCIS: B, C, D, F, M, P, Q, and TN. J visa holders are not eligible to establish residency for tuition purposes except as provided in Section 1009.21(10), F.S.

3. The student, and parent if the student is a dependent, must present evidence of legal presence in the United States.⁷⁸

These are the regulations challenged in *Ruiz v. Robinson*.⁷⁹

If an advocacy group such as the SPLC was seeking to generally challenge the policy of denying in-state tuition benefits to the U.S. citizen children of undocumented immigrants, the administrative scheme in Florida is an ideal target for such a challenge. As explained above, most states do not have a clear policy and resolve the question on a case-by-case basis. Such ad hoc policies could only be constitutionally challenged as applied, and the litigation would do little to bring about an overall change in policy. Florida has a firmly established administrative code directing how its residency statute should be applied. Unlike Virginia, the residency policy of Florida is particularly harmonious with Section 1623 of IIRIRA. It is unsurprising that Florida was the first state to be targeted in federal court. Although related legal battles are currently being waged elsewhere, *Ruiz v. Robinson* is the only federal challenge to a state policy of denying in-state tuition benefits to the U.S. citizen children of undocumented immigrants who would otherwise qualify for tuition benefits.⁸⁰

Before delving into a more detailed analysis of Ruiz, one other point should be made. The question of whether the dependent U.S. citizen children of undocumented immigrants should be considered residents for purposes of in-state tuition benefits is like “a fugue playing in the background” of the contentious debate over how states and the federal government should treat undocumented immigrants.⁸¹ The federal DREAM Act⁸² and its state

78. FLA. ADMIN. CODE r. 72-1.001(5)(a)(3) (2011).

79. *Ruiz v. Robinson*, 892 F. Supp. 2d 1321, 1321 (S.D. Fla. 2012).

80. The website of the University of Houston Law Center continuously monitors developments on these issues. For updates on recent cases involving undocumented college student issues visit <http://www.law.uh.edu/ihelg/undocumented-college-student-issues/homepage.asp> (last visited Nov. 1, 2013).

81. Michael A. Olivas, *Lawmakers Gone Wild? College Residency And The Response To Professor Kobach*, 61 SMU L. REV. 99, 101 (2008).

82. S. 952, 112th Cong. (2012), available at [http://thomas.loc.gov/cgi-bin/query/z?c112:S.952](http://thomas.loc.gov/cgi-bin/query/z?c112:S.952;); H.R. 1842, 112th Cong. (2012), available at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.1842>.

counterparts⁸³ must also be a part of the discussion. Under the DREAM Act, undocumented immigrants who have resided in the United States for five or more years, possess good moral character, and were brought to the United States prior to their fifteenth birthday, may be eligible for permanent resident status.⁸⁴ The DREAM Act would amend existing federal regulations that restrict a state's ability to grant in-state tuition benefits to undocumented immigrants, and it will give individual states the choice as to whether to allow beneficiaries of the DREAM Act to qualify for in-state tuition benefits.⁸⁵ The obvious irony is that, under the DREAM Act, it would be possible for Florida to legally deny U.S. citizens in-state tuition due to the immigration status of their parents, while at the same time, other states could grant in-state tuition to non-citizens. Admittedly, it is difficult to imagine this actually being the case, but this is one illustration of how the patchwork of state and federal statutes can lead to bizarre and contradictory results.

III. AN ANALYSIS OF *RUIZ V. ROBINSON*

There are five named plaintiffs in *Ruiz v. Robinson*.⁸⁶ All five are dependent U.S. citizens who have resided continuously in Florida and seek to earn post-secondary degrees from Florida public institutions.⁸⁷ As summarized by the court in its Order Granting In Part Plaintiffs' Motion For Summary Judgment and Denying Defendants' Motion for Summary Judgment, the circumstances of each plaintiff are as follows:⁸⁸

1. Wendy Ruiz was born in Miami and is a U.S. citizen by virtue of birthright. Ruiz has resided in Florida for her entire life and graduated from a public high school in Florida. Ruiz attempted to enroll at Florida International University but was unable to furnish proof of her parents' legal residency in the U.S. She ultimately matriculated to Miami Dade College where she was classified as an out-of-state resident for tuition purposes because she was a dependent student whose par-

83. See, e.g., *In-State Tuition and Unauthorized Immigrant Students* (2011), NAT'L CONF. STATE LEG., <http://www.ncsl.org/issues-research/immig/in-state-tuition-and-unauthorized-immigrants.aspx> (last visited Nov. 1, 2013).

84. S. 952, § 3.

85. *Id.* at § 9(b).

86. *Ruiz v. Robinson*, 892 F. Supp. 2d 1321, 1321 (S.D. Fla. 2012).

87. *Id.*

88. *Id.*

ents could not prove that they were legal residents of Florida under Sections 6A-10.044(4)(a) and 72-1.001(5)(a)(3) of the Florida Administrative Code. Consequently, Ruiz could not afford to enroll as a full-time student and will not be able to complete a two-year degree within two years.

2. Noel Saucedo was born in Miami and is a U.S. citizen by virtue of birthright. Saucedo has resided in Florida for the past six years and he graduated from a public high school in Florida. Saucedo was unable to enroll at Florida International University because he was unable to furnish proof of his parents' legal residency in the U.S. Although Saucedo initially qualified for a full-scholarship to Miami Dade College, he was classified as an out-of-state resident for tuition purposes because he was a dependent student whose parents could not prove that they were legal residents of Florida under Sections 6A-10.044(4)(a) and 72-1.001(5)(a)(3) of the Florida Administrative Code. Consequently, his scholarship was substantially reduced and he was unable to afford to enroll as a full-time student. Like Ruiz, Saucedo will not be able to complete his two-year degree within two years.
3. Caroline Roa was born in Miami and is a U.S. citizen by virtue of birthright. She has resided in Florida for her entire life and her father has resided in Florida for the past twenty-two years. Roa graduated from a public high school in Florida. Roa was accepted to Miami Dade College and was offered a full scholarship. However, Roa was classified as an out-of-state resident for tuition purposes because she was a dependent student whose parents cannot prove that they are legal residents of Florida under Sections 6A-10.044(4)(a) and 72-1.001(5)(a)(3) of the Florida Administrative Code and her scholarship offer was withdrawn. Consequently, Roa was unable to attend college.
4. Kassandra Romero was born in Los Angeles and is a U.S. citizen by virtue of birthright. Romero has resided in Florida continuously with her parents for the past fourteen years. Romero graduated from a public high school in Florida. She registered for classes at Palm Beach State College but was unable to furnish proof of her parents' legal residency in the U.S. Consequently, Romero was classified as an out-of-state resident for tuition purposes because she was a dependent student whose parents could not prove that they were legal

residents of Florida under Sections 6A-10.044(4)(a) and 72-1.001(5)(a)(3) of the Florida Administrative Code. She was unable to afford classes at Palm Beach State College and, therefore, unable to attend college.

5. Janeth America Perez was born in Miami and is a U.S. citizen by virtue of birthright. She has lived in Florida for her entire life and her mother has resided in Florida for the past twenty-five years. Perez graduated from a public high school in Florida. Perez was accepted to Miami Dade College but was unable to furnish proof of her parents' legal residency in the U.S. Consequently, she was classified as an out-of-state resident for tuition purposes because she was a dependent student whose parents could not prove that they were legal residents of Florida under Sections 6A-10.044(4)(a) and 72-1.001(5)(a)(3) of the Florida Administrative Code. Unable to afford college, she currently attends a U.S. Department of Labor program that offers technical training. Perez still hopes to attend college in the future.

The specific circumstance of each plaintiff is significant for several reasons.

First, it should be noted that each plaintiff could qualify for in-state tuition benefits under alternative theories. If each plaintiff were to be considered independent for purposes of Section 1009.21,⁸⁹ then each plaintiff would qualify for in-state tuition by virtue of their residency in Florida. Under this theory, the restrictions of IIRIRA would not be triggered.⁹⁰ Alternatively, if each plaintiff's parents were to be considered a legal resident of Florida by virtue of their continuous domicile in Florida, the plaintiffs would qualify for in-state tuition benefits. Under this theory, however, IIRIRA restrictions may be triggered.⁹¹

Second, the SPLC's litigation strategy was to pursue this claim as a class action.⁹² Therefore, it was essential that the named plaintiffs be carefully selected so as to satisfy the commonality and typicality requirements of Rule 23(a).⁹³ As an aside,

89. FLA. STAT. § 1009.21 (2011).

90. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1623.

91. See *id.*

92. Plaintiffs' Motion For Class Certification at 2, *Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 53).

93. FED. R. CIV. P. 23(a) ("Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law

under the Florida statutory scheme a student is no longer classified as dependent upon reaching the age of twenty-four.⁹⁴ Therefore, in order to avoid mootness, each plaintiff must be under the age of twenty-four in order to bring this challenge. Had the litigation become protracted, it is possible that the plaintiffs would have all reached their twenty-fourth birthdays, mooting their claims and terminating the lawsuit. Converting the claim into a class action is one method of circumventing this problem because the class of plaintiffs would continue to have a justiciable claim even as individual plaintiffs reach the age of twenty-four. There is precedent in the Eleventh Circuit that says that class certification is appropriate in claims by juveniles that would become moot when the plaintiffs reach the age of majority.⁹⁵

Finally, each plaintiff's story evokes sympathy. The plaintiffs suffered harm solely because of the undocumented status of their parents. This has legal significance because a fundamental tenet of American jurisprudence is that the law should not punish children for the sins of their parents. The U.S. Supreme Court has suggested that any government action that punishes children for the sins of their parents violates the Equal Protection Clause.⁹⁶ In *Kadrmass v. Dickinson Public Schools*, the Court noted that heightened scrutiny is appropriate when the government penalizes children for the illegal conduct of their parents.⁹⁷ Sympathetic plaintiffs are also useful from a practical perspective when it comes to legal challenges to immigration law.⁹⁸ Prof. Michael Olivas has noted that the plight of undocumented immigrants whose undocumented status is due to the illegal acts of their parents are the most likely to receive amnesty from Congress.⁹⁹ Similarly, it would seem that U.S. citizens who reside within a state and are classified as non-residents solely because of the undocumented status of their parents are likely to win an Equal Protection Challenge.

or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.”).

94. FLA. STAT. § 1009.21 (2011).

95. *Johnson v. City of Opelousas*, 658 F.2d 1065, 1070 (5th Cir. 1981). Cases decided in the Fifth Circuit prior to the Eleventh Circuit split have been adopted as binding precedent by the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

96. *Kadrmass v. Dickinson Public Schools*, 487 U. S. 450, 459 (1980).

97. *Id.* at 459.

98. See Olivas *supra*, note 31, at 1797.

99. *Id.*

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The plaintiffs' complaint, as amended, only raised two claims.¹⁰⁰ Count One sought injunctive and declaratory relief under Section 1983¹⁰¹ under the theory that Sections 6A-10.044(4)(a) and 72-1.001(5)(a)(3) of the Florida Administrative Code violated the Equal Protection Clause.¹⁰² The plaintiffs' theory was that Sections 6A-10.044(4)(a) and 72-1.001(5)(a)(3) impermissibly classified U.S. citizens based on the federal immigration status of their parents.¹⁰³ Count Two also sought injunctive and declaratory relief under Section 1983, under a theory that Sections 6A-10.044(4)(a) and 72-1.001(5)(a)(3) of the Florida Administrative Code violated the Supremacy Clause¹⁰⁴ of the U.S. Constitution.¹⁰⁵ Because the court ultimately granted summary judgment in favor of the plaintiffs on the first claim, the court never considered the plaintiffs' second claim.¹⁰⁶ Accordingly, this paper does not address the second claim.

For the most part, the facts of the case were undisputed.¹⁰⁷ The State of Florida conceded that the plaintiffs accurately characterized Florida's system of determining eligibility for in-state tuition and maintained that federal law required the state to classify students based on the immigration status of their parents.¹⁰⁸ For their part, the plaintiffs conceded that they were properly classified as non-residents for tuition purposes under the existing statutory scheme.¹⁰⁹ The State also did not contest that, if the plaintiffs' legal theory was correct, the plaintiffs would have suffered a legally cognizable injury and would be entitled to the relief sought.¹¹⁰ The only significant issue contested at the close of dis-

100. Amended Complaint at 24-25, *Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 29).

101. 42 U.S.C. § 1983 (2006).

102. Amended Complaint at 24, *Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 29).

103. Plaintiffs' Motion For Summary Judgment at 8-9, *Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 75).

104. U.S. CONST. art. VI, § 2.

105. Amended Complaint at 25, *Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 29).

106. *Ruiz*, 892 F. Supp. 2d. at 1333.

107. See Plaintiffs' Motion For Summary Judgment, *supra* note 103, at 3-8; Defendants' Motion in Opposition to Plaintiffs' Motion For Summary Judgment at 3-4, *Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 85); Defendants' Motion For Summary Judgment at 3-4, *Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 81).

108. *Id.*

109. Defendants' Motion in Opposition to Plaintiffs' Motion For Summary Judgment, *supra* note 107, at 1-2.

110. *Id.*

covery was whether the plaintiffs' parents were residents of Florida.¹¹¹ This wrangling over terminology actually goes to the substance of the plaintiffs' legal challenge and did not prevent the court from disposing of the case through competing motions for summary judgment.¹¹² The dispute demonstrates the level of nuance inherent in classifying dependent students (or minors in general) for purposes of determining their eligibility for public benefits. Had the Florida statute used the word "domiciled," as did Colorado, the statutory analysis might have been different. After all, the legal definition of "domiciled" does not include a requirement of "lawful presence."¹¹³

The plaintiffs' argument appears straightforward at first. A closer look will reveal that their claim goes to the heart of the existing tensions between PRWORA, IIRIRA, and the various residency requirements in each of the fifty states. The plaintiffs argue that, factually, they meet all of the statutory requirements to qualify for in-state tuition benefits. Nonetheless, they remain barred from receiving these benefits because they cannot establish their parents' federal immigration status so as to satisfy the requirements of Sections 6A-10.044(4)(a) and 72-1.001(5)(a)(3) of the Florida Administrative Code.¹¹⁴ This is where the complexity of the plaintiffs' claim demonstrates itself. The plaintiffs do not contest that Florida has a right to classify between residents and non-residents for tuition purposes.¹¹⁵ Nor do they contest, at least not directly, the defendants' claim that undocumented immigrants cannot be considered legal residents of Florida.¹¹⁶ They instead argue that the administrative policies of Florida are such that the plaintiffs cannot be considered residents of any state at all. Thus, Sections 6A-10.044(4)(a) and 72-1.001(5)(a)(3) of the Florida Administrative Code discriminate against the U.S. citizen plaintiffs based on the alienage of their parents. Because of their parents' alienage, the plaintiffs are treated differently from similarly-situated dependent students who are U.S. citizens and whose parents have resided continuously in the State of Florida for twelve

111. See Defendants' Motion in Opposition to Plaintiffs' Motion For Summary Judgment at 10, n.5., Ruiz v. Robinson, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 81).

112. *Id.*

113. See Melian v. INS, 987 F.2d 1521, 1524 (11th Cir. 1993).

114. Plaintiffs' Motion For Summary Judgment at 8-9, Ruiz v. Robinson, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 75).

115. *Id.*

116. *Id.*

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months prior to their application to a public institution of higher learning. Also, because of their parents' alienage, it would take the plaintiffs six years longer than their peers to establish Florida residency. The plaintiffs would not qualify for Florida residency until they turned twenty-four, but a similarly-situated U.S. citizen could establish Florida residency after twelve months so long as their parents resided in the state continuously for those twelve months.¹¹⁷

Their argument stretches the limits of the plain language of Section 1621 of PRWORA.¹¹⁸ That section specifically limits the ability of states to confer public postsecondary education benefits on the households of undocumented immigrants. The relevant portions of Section 1621 are as follows:

(a) In general:

Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, any alien who is not [covered under subsections (1), (2), or (3), text omitted] is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

* * *

(c) "State or local public benefit" defined

(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term "State or local public benefit" means –

* * *

(B) any . . . postsecondary education . . . benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriate funds of a State or local government.

* * *

(d) State authority to provide for eligibility of illegal aliens for State and local public benefits:

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit to which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

The plaintiffs attempt to avoid PRWORA in two ways.

117. *Id.*

118. 8 U.S.C. § 1621.

Their first argument is that residency classifications are not “payments or assistance” as defined by the statute.¹¹⁹ Citing a decision from the Eastern District of Virginia that defines “payments or assistance” under PRWORA as referring only to “monetary assistance paid,”¹²⁰ the plaintiffs argue that residency classifications merely determine the rate owed. Further, because in-state residents are given other forms of preferential consideration, classification as an in-state residents is something separate and beyond “payments or assistance.” Their second argument is that in-state tuition is not a “household” benefit, but a benefit which attaches to the student as an individual. Because the individual students are U.S. citizens, the restrictions of PRWORA cannot be implicated. In support of this proposition, they cite the Colorado Memorandum, which affirms that tuition benefits flow to the individual student and not to the household. They also cite a recent decision from a New Jersey state appellate court that overturned a similar administrative regulation.¹²¹

Unsurprisingly, both the defendants’ opposition to the plaintiffs’ claims and the substance of their own summary judgment motion is that federal law essentially mandates Florida’s policies.¹²² By maintaining that classification as a resident for tuition purposes is a household benefit under PRWORA, it would be impossible to classify the plaintiffs as residents for tuition purposes without, “opening the proverbial floodgates to all United States citizens and their children—even those with no presence in Florida whatsoever—. . . effectively reset[ting] tuition at the lower rates, eliminating preferences for those persons who otherwise meet Florida’s legal residency requirements, and their dependent children . . .”¹²³ This would result in a net loss of \$200,000,000 in

119. Plaintiffs’ Combined Opposition to Defendants’ Summary Judgment Motion and Reply in Support of Plaintiffs’ Summary Judgment Motion at 2-3, *Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 89).

120. *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 605 (E.D. Va. 2004).

121. *A.Z. ex rel. B.Z. v. Higher Educ. Student Assistance Auth.*, 2012 WL 3192641, at * 3-4 (N.J. Super. Ct. App. Div. Aug. 8, 2012).

122. Defendants’ Motion in Opposition to Plaintiffs’ Motion For Summary Judgment at 11-14, *Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 85); Defendants’ Motion For Summary Judgment at 5-12, *Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 81).

123. Defendants’ Motion in Opposition to Plaintiffs’ Motion For Summary Judgment at 11, *Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 85).

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tuition revenue per year.¹²⁴ Such a devastating financial blow to the state cannot be required.

Although both the plaintiffs and the defendants acknowledge that their positions hinge on whether in-state tuition benefits should be properly viewed as flowing to the individual U.S. citizen student or to the student's household, neither party explicitly addresses how the distinction between dependent and independent students can survive if in-state tuition is not a household benefit.¹²⁵ The avoidance of this central issue is likely explained by the fact that neither party seeks to challenge the general principle that dependent students must establish residency via their parents. If in-state tuition benefits are properly seen as flowing to the individual, what justification can there ever be for looking to the residency of the student's parents?

California's statute, discussed above, suggests one method for solving this problem.¹²⁶ It allows students to receive in-state tuition based on attendance of a California high school.¹²⁷ In 2010, a group of U.S. citizens who were not residents of California and were paying non-resident tuition to attend California universities brought a class action suit against The Regents of the University of California.¹²⁸ The crux of their challenge was that PRWORA and IIRIRA preempted the California statute and made it unlawful for the state to allow undocumented immigrants to receive in-state tuition under any circumstances. The Supreme Court of California ultimately denied the challenge, finding that California's statute is consistent with the federal regulatory scheme.¹²⁹ It is unclear whether a federal court would concur if the statute were challenged in federal court.

Although the *Martinez* decision did not resolve the question of under what circumstances a state can provide in-state tuition benefits to undocumented immigrants under PRWORA and IIRIRA, it is clear that there is no major constitutional problem with such statutes. It is well-settled law that both the state and federal gov-

124. *Id.* at 12.

125. See Plaintiffs' Combined Opposition To Defendants' Motion For Summary Judgment And Reply In Support Of Plaintiffs' Motion For Summary Judgment at 4-5, Ruiz v. Robinson, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 89).

126. CAL. EDUC. CODE § 68130.5 (West 2002).

127. *Id.*

128. *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 859 (Cal. 2010).

129. *Id.* at 1298-1300.

ernment can create classifications based on alienage.¹³⁰ Any other position would “obliterate all distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.”¹³¹ However, when a state’s residency requirements begin to take into account the immigration status of a U.S. citizen’s parents, these requirements may violate the Equal Protection Clause.¹³²

The court’s opinion in *Ruiz* does not conclusively resolve these issues. In granting summary judgment in favor of the plaintiffs on their first claim, the court holds that the defendants’ argument necessarily fails because the defendants have “fundamentally misconstrued PRWORA.”¹³³ Because, under the plain language of PRWORA, the plaintiffs are not aliens, the court determines that PRWORA cannot bear on the state’s decision to classify the plaintiffs as non-residents for tuition purposes.¹³⁴ The court does not directly address the argument over whether in-state tuition benefits flow to the household so as to implicate PRWORA. The opinion does not explain its conclusion that the defendants have “fundamentally misconstrued” PRWORA. The court does state that its conclusion is “bolstered” by the fact that the benefits attach to the students and not the parents.¹³⁵ It even cites the Colorado Memorandum in support of this observation.¹³⁶ But it does not directly address how dependency classifications can survive this conclusion.¹³⁷ The court simply finds that PRWORA and IIRIRA do not require Florida to offer in-state tuition rates to all U.S. citizens without further exploration of the consequences.¹³⁸ Therefore, the opinion seems to imply that PRWORA and IIRIRA simply have no bearing on the state’s residency classification system.

IV. THE LANDSCAPE OF THE BATTLEFIELD AFTER *RUIZ v. ROBINSON*

The conclusion reached by the court in *Ruiz* seems obvious and intuitively correct. Given the constitutional guarantee of equal protection under the law, it seems impossible to imagine that any state action that denies residency benefits to U.S. citi-

130. *See, e.g.*, *Foley v. Connelie*, 435 U.S. 291, 296 (1978).

131. *Id.* at 295 (quoting *Nyquist v. Mauclet*, 432 U.S. 1, 14 (1978)).

132. U.S. CONST. amend. XIV.

133. *Ruiz v. Robinson*, 892 F. Supp. 2d 1321, 1330 (S.D. Fla. 2012).

134. *Id.*

135. *Id.*

136. *Id.* at 1330-31.

137. *Id.*

138. *Id.*

zens because of the acts of their parents could ever pass constitutional muster.¹³⁹ Yet, states have engaged in this practice since at least since 1990.¹⁴⁰ However, even if the practice is unconstitutional, as Judge Moore concluded in *Ruiz*, and obviously so, as Prof. Olivas alleges, the practice has neither been widely challenged nor made the focal point of immigration reform efforts.¹⁴¹ Olivas suggests that the lack of attention that this issue has received can be explained by the political motives of those who would potentially challenge such practices.¹⁴² Activists who believe in more accommodating policies toward undocumented immigrants choose not to devote their scarce resources to the problems faced by the U.S. citizen children of undocumented immigrants.¹⁴³ After all, “the issue is so absurd, and so wide of the mark that it will resolve itself once the light is shown upon the offending practice.”¹⁴⁴ Meanwhile, “nativists are so determined to extirpate undocumented parents that they have tolerated these practices as the inevitable work of birthright citizenship being extended to their undeserving children.”¹⁴⁵

This political explanation has some merit, but it is too basic. A major reason why this seemingly obvious injustice is both prevalent in state universities, and seemingly resistant to challenge, is because this issue arises at the intersection of immigration policy and education policy. Activist groups for immigration reform may be disinclined to take their resources away from the problem of tuition for undocumented college students—a cause that has received substantial political attention in the debate over the DREAM Act¹⁴⁶—and focus on the plight of U.S. citizen children of undocumented immigrants. They may justifiably fear that further

139. See *Kadrmas v. Dickinson Pub. Sch.*, 487 U. S. 450, 459 (1980).

140. Michael A. Olivas, *Higher Education, Financial Aid, Residency, and Undocumented Parents of U.S. Citizen College Students*, UNIV. OF HOUS. L. CTR. INST. FOR HIGHER EDUC. & GOVERNANCE, http://www.law.uh.edu/ihelg/undocumented_parents/homepage.asp (last visited Sept. 20, 2013). Olivas identifies *E.C. v. Obergfell*, No. 1:06-CV-0359-DFH-WTL, (S.D. Ind. 2006) as the first legal challenge to such a practice. The policy challenged in that case had been in effect since 1990; see also Class Action Complaint for Injunctive and Declaratory Relief, *E.C. v. Obergfell*, No. 1:06-CV-0359-DFH-WTL (S.D. Ind. 2006).

141. Olivas, *supra* note 140.

142. *Id.*

143. *Id.*

144. See *id.*

145. *Id.*

146. See Olivas, *supra*, note 31, at 1757-58 (discussing the surprisingly substantial role that the DREAM Act played in the 2007/2008 election season given the relatively small number of people who would benefit from enactment of the DREAM Act).

litigation in this area could upset the entire system used by state universities to award tuition benefits. The decision in *Ruiz* potentially threatens the long-standing practice of many states of using dependency as a factor in awarding tuition benefits. Advocacy groups may be deterred from pursuing cases such as *Ruiz* because courts may be reluctant to render a decision that would result in a substantial financial blow to the economy of the state.

As discussed above, Judge Moore's decision rested on the assumption that tuition benefits should properly be seen as flowing to the individual student and not the household.¹⁴⁷ The state of Florida maintained that if tuition benefits are viewed as a household benefit, the provisions of Section 1623 would be triggered and the state would lose approximately \$200,000,000.00 in revenue annually.¹⁴⁸ The court wrote that that PRWORA and IIRIRA do not require Florida to extend in-state tuition benefits to all U.S. citizens, but this conclusion could potentially be challenged in subsequent litigation. Surely persons under the age of 24 that are domiciled in Florida, but are classified as nonresidents for tuition purposes because they are dependents of persons who live outside the state of Florida, would have reason to bring such a challenge. The risk that *Ruiz* could set precedent that ultimately undermines the ability of states to award tuition benefits to households rather than individuals is yet another reason why the immigration issues raised by *Ruiz* should be resolved by federal action. The deceptively simple opinion in *Ruiz* leaves several questions unanswered. First, it is unclear how the opinion affects the obligations of Florida under federal law. The decision may have some unintended consequences for students who seek to establish residency independent of their parents.¹⁴⁹ Second, it is difficult to predict whether the decision in *Ruiz* would be applicable as a persuasive authority if challenges were brought against similar policies in other states. Florida is unique in that its policy of classifying the U.S. citizen children of undocumented immigrants as nonresidents for tuition purposes was enshrined in the administrative code. However, many other states simply have statutes that delegate such residency determinations to individual universities on a

147. *See supra* Part III.

148. Defendants' Motion For Summary Judgment at 12, *Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (ECF. No. 81); Defendants' Motion in Opposition to Plaintiffs' Motion For Summary Judgment at 14, *Ruiz v. Robinson* at 6, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (No. 11-cv-23776-KMM) (ECF No. 85).

149. FLA. STAT. § 1009.21 (2011).

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case-by-case basis.¹⁵⁰ Many universities may have a policy of looking to the immigration status of the parents, but this may be extraordinarily difficult to prove. The U.S. Supreme Court has been willing to give states a fair amount of leeway in making residency determinations for tuition purposes. “A State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.”¹⁵¹

Another factor that makes it difficult to predict the reach of *Ruiz* is that U.S. citizen children of undocumented immigrants can be denied the benefits of residency in other ways. For example, one of the earliest lawsuits regarding the denial of educational benefits to the U.S. citizen children of undocumented immigrants centered on an administrative policy that governed the awarding of Indiana’s Twenty First Century Scholars program.¹⁵² Indiana law had set certain minimum requirements that students must meet in order to qualify for the scholarship,¹⁵³ but the Indiana Administrative Code gave the Executive Director of the State Student Assistance Commission of Indiana Scholarships authority to set his own policies and criterion for eligibility.¹⁵⁴ The Executive Director had set a policy of denying scholarship benefits to otherwise-eligible students if their parents were undocumented.¹⁵⁵ That case was ultimately settled. Similarly, the New Jersey case—cited by both the attorney general of Colorado in his memorandum and by the Plaintiffs in *Ruiz*—did not address in-state tuition, but focused on a New Jersey regulation that allowed U.S. citizen children of undocumented immigrants to be denied certain scholarship benefits.¹⁵⁶ In the absence of comprehensive federal action, every aspect of a state’s educational policy may infringe on the rights of the U.S. citizen children of undocumented immigrants until separately challenged.

The parade of disasters that could potentially arise from a

150. Seo, *supra* note 17, at 325-26.

151. *Vlandis v. Kline*, 412 U.S. 441, 453 (1973).

152. Class Action Complaint for Injunctive and Declaratory Relief, E.C. v. Obergfell, No. 1:06-CV-0359-DFH-WTL (S.D. Ind. 2006).

153. IND. CODE § 20-12-70-1 to -15 (2006), *repealed by* IND. P.L.2-2007, Sec.390., 2007.

154. 585 IND. ADMIN. CODE 8-2-7 (2006).

155. Class Action Complaint for Injunctive and Declaratory Relief, E.C. v. Obergfell, No. 1:06-CV-0359-DFH-WTL (S.D. Ind. 2006).

156. *A.Z. ex rel. B.Z. v. Higher Educ. Student Assistance Auth.*, 2012 WL 3192641, at * 3-4 (N.J. Super. Ct. App. Div. Aug. 8, 2012).

strictly literalist reading of state and federal law in the aftermath of *Ruiz* is unlikely to occur. What is more troubling about the decision in *Ruiz* is that it does not address the nationwide problem. Instead, it is just one more in a patchwork of incongruous immigration decisions regarding matters of state law.¹⁵⁷ If this pattern of addressing immigration problems at the state level persists, the entire constitutional structure of immigration law could be imperiled.¹⁵⁸ The ability of U.S. citizen children to access public benefits for post-secondary education is certainly important. Although access to post-secondary education is not recognized as a fundamental right under the U.S. Constitution, even the defendants in *Ruiz* concede the importance of post-secondary education. In 2011, the unemployment rate among persons with a bachelor's degree was almost half of those with only a high school diploma and those with a bachelor's degree earned almost \$500.00 more per week than those with only a high school diploma.¹⁵⁹ Legal barriers to attaining a post-secondary education can have devastating and lifelong consequences. But even the most fundamental elements of U.S. immigration law are imperiled by the devolution of immigration policy into a matter of state law.

Birthright citizenship is perhaps the most basic aspect of the national immigration policy with its roots in the Fourteenth Amendment to the U.S. Constitution.¹⁶⁰ Yet, in 2011, a bill was introduced in the Arizona legislature that would deny state citizenship to children of undocumented immigrants¹⁶¹ and require the issuance of separate birth certificates for such children.¹⁶² Although the legislation was not passed and would most certainly be successfully challenged as a violation of the U.S. Constitution, the Supreme Court's decision in *Arizona v. United States* suggests that, in the face of federal inaction, courts will be more tolerant of immigration initiatives at the state level. What is clear is that the problem will only be definitively resolved through Congressional action.

157. Haynes, *supra* note 7, at 301.

158. U.S. CONST. art. I, § 8, cl. 4; *Toll v. Moreno*, 458 U. S. 1, 10 (1979).

159. *Ruiz v. Robinson*, 892 F. Supp. 2d 1321, 1329 (S.D. Fla. 2012) (citing *Education Pays*, U.S. DEPT OF LABOR BUREAU OF LABOR STATISTICS, (Mar. 23, 2012)), http://www.bls.gov/emp/ep_chart_001.htm.

160. U.S. CONST. amend. XIV; *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898).

161. H.B. 2561, 50th Leg., 1st Reg. Sess. (Ariz. 2011); S.B. 1309, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

162. H.B. 2562, 50th Leg., 1st Reg. Sess. (Ariz. 2011); S.B. 1308, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

